ADORNA PROPERTIES SDN BHD

v.

KOBCHAI SOSOTHIKUL

FEDERAL COURT, PUTRAJAYA
PS GILL FCJ
RAHMAH HUSSEIN FCJ
RICHARD MALANJUM JCA
[CIVIL APPEAL NO: 02-14-1997 (P)]
27 AUGUST 2004

CIVIL PROCEDURE: *Jurisdiction - Federal Court - Inherent powers of court - Application under r. 137 Federal Court Rules 1995 - Order praying for judgment to be set aside in the interest of justice - Judgment resulted in rightful owner losing lands due to forged documents under proviso to s. 340(3) National Land Code - Whether grave injustice occasioned - Whether application proper*

This was an application pursuant to r. 137 of the Rules of the Federal Court 1995 ('r. 137') to set aside an order of this court pronounced on 22 December 2000 in the interests of justice. It was not disputed that there was an earlier application ('first application') by the same applicant before this court wherein the ground advanced was coram failure in that one of the judges who had presided had retired before the main judgment was delivered. That first application was dismissed. In this application the respondent raised the following issues in its preliminary objection. Firstly, that the order prayed for was already dealt with in the first application. Secondly, that the order in respect of the judgment delivered ('main judgment') was perfected in that it was sealed and extracted. Thirdly, that this application should be dismissed notwithstanding the ground relied upon as there should be finality to the litigation. Fourthly, that no party should be allowed to ventilate his grievances by way of instalment as the applicant herein. The applicant responded submitting, *inter alia*, that injustice had occasioned in that the main judgment resulted in the rightful owner losing her lands *vide* forged documents. Further, that a distinction should be drawn between the first application and this one in that the latter relied on the residuary jurisdiction or inherent jurisdiction of this court to set aside the main judgment in the interest of justice.

Held (dismissing the application)
PS Gill FCJ delivering the judgment of the court:

[1] The consequence and effect of the main judgment might be harsh when viewed without the benefit of the relevant statutory provision. However, this was not a case where grave injustice had occasioned due to clear infringement of law thereby making it permissible for successive application to be made under r. 137. The substance of the main judgment revolved in the interpretation of sub-s. (3) of s. 340 of the National Land Code including the proviso thereof. Based on the reasoning given in the main judgment and the words used in the said subsection and proviso, the interpretation given by the court was not patently wrong thereby resulting in grave injustice warranting a successive application under r. 137. (pp 571 d-h & 572 a)

[2] There was much force to be given to the contention that there should be finality to any litigation. The main judgment was handed down by the apex court of this country. The application of r. 137 should not be made liberally as that might result in chaos to the system of judicial hierarchy. There would be nothing to prevent any aggrieved litigant from challenging any decision of this court on the ground of injustice *vide* r. 137. If he succeeds in his application there was nothing to bar the other party from making his own application to overturn such success. There would be no end to the matter. This was not the intention of the legislature when promulgating the said rule. (p 572 c-d)

[3] This application was weakened by the fact that there was the first application heard and dismissed by this court. It was never suggested that the ground advanced in this application was not available then. The only reason given before this court was human error. This was not sufficient to overlook the implication that to allow this application would tantamount to permitting the applicant to advance his grievances by instalment. (p 572 e)

[4] There was the element of delay on the part of the applicant. There was a lapse of almost 18 months before this application was made. Therefore not only the grounds were submitted by way of instalment, there was delay as well. Such an attitude should not be condoned nor encouraged. (p 572 f-g)

[5] A court of law is duty-bound to ensure that the interests of all parties appearing before it are equally safeguarded. Public interest expects it. It would be highly undesirable and prejudicial to a successful litigant to be kept in limbo while the unsuccessful party ponders as to his next course of action. (p 572 g)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah suatu permohonan di bawah k. 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 (k. 137') untuk mengetepikan suatu perintah mahkamah ini pada 22 Disember 2000 demi kepentingan keadilan. Ianya tidak dipertikaikan bahawa terdapatnya suatu permohonan sama sebelum permohonan ini ('permohonan pertama') di mana alasan yang dikemukakan adalah kegagalan kuorum disebabkan salah seorang hakimnya telah bersara sebelum penghakiman utama disampaikan. Permohonan pertama tersebut telah ditolak. Dalam permohonan ini, responden membangkitkan isu-isu yang berikut dalam bantahan permulaan. Pertamanya, perintah yang dipohon di sini telah pun dilayan dalam permohonan pertama. Keduanya, perintah berkenaan penghakiman yang disampaikan ('penghakiman utama') telah pun disempurnakan di mana ianya telah dimeterai dan diambil. Ketiganya, permohonan ini patut ditolak meskipun alasan yang digantung semestinya supaya terdapat litigasi yang muktamad. Keempatnya, tiada pihak yang patut dibenarkan untuk mengudarakan kilanan secara ansuran seperti perayu di sini. Pemohon menjawab, *inter alia*, bahawa ketidakadilan telah berlaku akibat penghakiman utama di mana pemilik sebenar telah kehilangan tanah-tanahnya *vide* dokumen-dokumen palsu. Lagi, perbezaan patut dibuat di antara permohonan pertama dengan permohonan ini disebabkan permohonan ini bergantung kepada bidang kuasa baki mahkamah yang ada ataupun kepada bidang kuasa yang sedia ada untuk mengetepikan penghakiman utama demi kepentingan keadilan.

Diputuskan (menolak permohonan)
PS Gill HMP menyampaikan penghakiman mahkamah:

[1] Akibat dan kesan penghakiman utama mungkin kejam apabila dilihat tanpa faedah peruntukan undang berkenaan. Tetapi, ini bukan kes di mana ketidakadilan yang teruk berlaku disebabkan pelanggaran jelas undang-undang untuk membenarkan permohonan berturut-turut di bawah k. 137. Substans penghakiman utama berkenaan interpretasi sub-s (3) s. 340 Kanun Tanah Negara termasuk provisonya. Berasaskan alasan yang diberikan di dalam penghakiman utama dan perkataan-perkataan yang dipakai di dalam sub-seksyen dan proviso tersebut, interpretasi yang diberikan mahkamah tidaklah salah sehinggakan terdapatnya ketidakadilan mengakibatkan permohonan berturut-turut di bawah k. 137.

[2] Terdapat banyak kekuatan kepada hujahan bahawa perlunya penghakiman yang muktamad berkenaan sesuatu kes. Penghakiman utama disampaikan oleh mahkamah tertinggi negara ini. Pemakaian k. 137 tidak mesti dibuat secara liberal kerana ia mungkin akan mengakibatkan huru-hara di dalam sistem hierarki kehakiman. Tiada apa-apa yang boleh mencegah seseorang litigan terkilan daripada mencabar mana-mana keputusan mahkamah ini atas alasan ketidakadilan *vide* k. 137. Kalau ia berjaya di dalam permohonannya tiada apa-apa yang boleh menghalang pihak berlawan daripada membuat permohonannya sendiri untuk menterbalikkan kejayaan tersebut. Perkara ini tidak akan berakhir. Ini bukan niat badan perundangan apabila mengubal kaedah tersebut.

[3] Permohonan ini dilemahkan oleh fakta bahawa terdapatnya permohonan pertama itu yang didengar dan ditolak oleh mahkamah ini. Ianya tidak dianjurkan bahawa alasan yang dikemukakan di dalam permohonan ini tidak tersedia pada masa itu. Alasan yang satu-satunya diberikan ialah bahawa kesilapan manusia. Ini tidak mencukupi untuk membiarkan implikasi bahawa dengan membenarkan permohonan ini pemohon dibolehkan untuk mengajukan kilanannya secara ansuran.

[4] Terdapat elemen kelewatan di sebelah pihak pemohon. Terdapat keterlanjuran 18 bulan sebelum permohonan ini dibuat. Dengan itu, selain dari alasan-alasan yang dikemukakan secara ansuran, terdapat juga kelewatan. Sikap sedemikian tidak patut dibiarkan ataupun digalakkan.

[5] Sebuah mahkamah undang-undang berkewajipan untuk memastikan bahawa kepentingan semua parti-parti dilindungi secara saksama. Kepentingan awam mengharapkan sedemikian. Ianya amatlah tidak diingini atau memprejudiskan seseorang litigan yang berjaya untuk berada dalam keadaan ketidakpastian sambil parti yang tidak berjaya memikirkan tindakan seterusnya.

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 CA ***(refd)***

Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***

Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [2001] 4 CLJ 61 FC ***(refd)***

Lye Thai Sang & Anor v. Faber Merlin (M) Sdn Bhd & Ors [1985] 2 CLJ 423; [1985] CLJ (Rep) 196 SC ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Bhd [2002] 1 CLJ 645 FC ***(refd)***

MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [2002] 3 CLJ 577 FC ***(refd)***

Tai Chai Yu v. The Chief Registrar of The Federal Court [1998] 2 CLJ 358 CA ***(refd)***

Legislation referred to:
National Land Code, s. 340
Rules of the Federal Court 1995, r. 137

For the applicant - Bastian Pius Vandargon (PK Nathan & Bernard Kok)
For the respondent - Ghazi Ishak (Ong Kheng Leong)
Low Beng Choo watching brief for Bar Council

[Appeal from Court of Appeal, Civil Appeal No: P-02-268-95]

Reported by Usha Thiagarajah

JUDGMENT

PS Gill FCJ:

Before us is an application by way of notice of motion made pursuant to r. 137 of the Rules of the Federal Court 1995. The applicant, Kobchai Sosothikul, is the substituted party for his late mother Boonsom Boonyanit @ Sun Yok Eng the former registered owner of parcels of land known as Lots 3606 & 3607 Mukim 18, Tanjung Bungah, Penang ('the said lands'). One of the orders sought for in this application is 'that the judgment of this Honourable Court pronounced on 22 December 2000 be set aside and that this appeal be re-heard by this Honourable Court on a date to be fixed'.

On 22 December 2000 this court delivered its judgment ('the main judgment') in an appeal by the respondent in this application whereby it was held, inter alia, that in view of the proviso in sub-section (3) of s. 340 of the National Land Code any purchaser of land in good faith and for valuable consideration is excluded from the application of the substantive provision of sub-section (3) thereof. Thus, he obtains an immediate indefeasible title even if the instrument of transfer is forged. Accordingly this court held that 'on the facts of this case', the appellant ('the respondent herein') obtained an indefeasible title to the said lands.

Now, the facts of this case upon which the present application arises have been well rehearsed in the main judgment as well in the judgment of the Court of Appeal. (See: *Adorna Properties Sdn Bhd v. Boonsom Boonyanit @ Sun Yok Eng* [2001] 2 CLJ 133 and *Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17).

And it is not in dispute that the present applicant being dissatisfied with the main judgment filed an application by way of notice of motion on 16 February 2001 ('the first application') ('encl. 30') pursuant to the same r. 137 of the Federal Court Rules 1995 seeking for orders, *inter alia*, 'that the judgment of this Honourable Court pronounced on 22 December 2000 be set aside and that

this appeal be reheard by this Honourable Court on a date to be fixed' (prayer 3). The main ground advanced was coram failure in that when the main judgment was delivered 'the Honourable Justice Tun Dato' Seri Mohd Eusoff Chin had retired on 19 December 2000'.

On 26 February 2001 this court comprising of Mr. Justice Datuk Steve Shim Lip Kiong CJ (Sabah & Sarawak) together with Mr. Justice Dato' Haidar bin Mohd Noor FCJ (as he then was) and the late Justice Tan Sri Mokhtar Abdullah FCJ heard the first application and having listened to the submissions of all the parties, proceeded to dismiss it with costs.

At the outset of the hearing before us learned counsel for the respondent raised a preliminary objection on the jurisdiction of this court to hear this present application. It was submitted that the order prayed for in the present application had already been dealt with in the first application. It was also contended that the order in respect of the main judgment had been perfected in that it had been sealed and extracted. He urged this court to dismiss this present application notwithstanding the ground relied upon, namely, 'in the interest of justice and to prevent injustice'. Learned counsel said that there should be finality to any litigation. It was also submitted that no party should be permitted to ventilate his grievances by way of instalment as was done by the applicant in this present application. And in answer to our query learned counsel conceded that under r. 137 successive applications are permissible provided grave injustice could be shown.

In response to the preliminary objection learned counsel for the Applicant submitted, *inter alia*, that there should be no issue of res judicata since for the doctrine to apply abuse must be shown. He also contended that since there was no judicial determination as such the main judgment should be set aside on the ground of nullity. It was also submitted that injustice had occasioned in that the main judgment resulted in the rightful owner losing her lands *vide* forged documents. A distinction was also drawn between the first and the present application in that the latter relies on the residuary jurisdiction or inherent jurisdiction of this court to set aside the main judgment in the interest of justice and to prevent injustice.

We took time to consider the preliminary issue raised in view of the implication that may arise from our decision. We deferred hearing the merits of this application since our decision on the preliminary objection could have a determining effect on the matter as a whole. And in the course of our deliberation we read and re-read r. 137 and its application as pronounced by this court in several cases. (See: *Lye Thai Sang & Anor v. Faber Merlin (M) Sdn Bhd & Ors* [1985] 2 CLJ 423; [1985] CLJ (Rep) 196; *Tai Chai Yu v.*

The Chief Registrar of The Federal Court [1998] 2 CLJ 358; *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61; *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577 and *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Bhd* [2002] 1 CLJ 645).

For convenience, r. 137 reads:

> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

Without rendering our view on the legal position of r. 137 *vis-à-vis* the Courts of Judicature Act 1964, being the enabling statute, and whilst not endorsing any view that the earlier decisions of this court on the said Rule set the parameters on the jurisdiction of this court in respect thereof, we are inclined to sustain the preliminary objection and that this present application should therefore be dismissed in limine.

Our reasons may be shortly stated. Firstly, although the consequence and effect of the main judgment may be harsh when viewed without the benefit of the relevant statutory provision, we do not think this is a case where 'grave injustice had occasioned' due to clear infringement of any principle of law thereby making it permissible for successive application to be made under the said rule. Without going into the merits of this application we find that the substance of the main judgment revolves in the interpretation of s. 340 subsection (3) including the proviso thereof of the National Land Code. That provision reads:

> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s (2):
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> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
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> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

a And having read the reasoning therein and bearing in mind the words used in the said subsection including the proviso we are not convinced that the interpretation given in the main judgment is patently wrong thereby resulting in grave injustice thus warranting successive application under r. 137. And even if we are wrong our view it should be left to another occasion to further debate b on the issue. For now we are of the opinion that despite the concession made by learned counsel for the respondent on the issue of successive application this is not a proper case for us to proceed to hear the merits or to grant the order as sought for.

Secondly, there is much force to be given to the contention that there should c be finality to any litigation. The main judgment was handed down by this Court which is the apex court of this country. If the application of r. 137 is made liberally the likely consequence would be chaos to our system of judicial hierarchy. There would then be nothing to prevent any aggrieved litigant from challenging any decision of this court on the ground of 'injustice' *vide* r. 137. d And if he succeeds in his application there is also nothing to bar the other party from making his own application to overturn such success. In short, there will be no end to the matter. We do not think that was the intention of the legislature when promulgating the said rule.

Thirdly, this present application is weakened by the fact that there was the e first application heard and dismissed by this court. And it was never suggested that the ground advanced in this application was not available then. The only reason given before us was 'human error'. We do not think that is sufficient for us to overlook the implication that to allow this application would tantamount to permitting the applicant to advance his grievances by instalment. f

Fourthly, there is also the element of delay on the part of the applicant. The first application was made in 2001 and after its disposal there was a lapse of almost 18 months before the present application was filed on 12 July 2002. Thus not only the grounds were submitted by way of instalment, there was g delay as well. We do not think this court should condone, let alone encourage, such an attitude. A court of law is duty-bound to ensure that the interests of all parties appearing before it are equally safeguarded. Public interest expects it. And it would be highly undesirable and prejudicial to a successful litigant to be kept in limbo while the unsuccessful party ponders as to his next course of action. h

This present application is therefore dismissed with costs. Preliminary objection sustained.

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